

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RICHARD GERALD ROUSEY, ET UX., :

4                   Petitioners                   :

5           v.   :   No. 03-1407

6   JILL R. JACOWAY.                                       :

7   - - - - -X

8   Washington, D.C.

9   Wednesday, December 1, 2004

10                   The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States at

12   10:03 a.m.

13   APPEARANCES:

14   PAMELA S. KARLAN, ESQ., Stanford, California; on behalf of

15           the Petitioners.

16   COLLI C. McKIEVER, ESQ., Fayetteville, Arkansas; on behalf

17           of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: We'll hear argument in the  
case of Rousey against Jacoway.

Ms. Karlan.

ORAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE PETITIONERS

MS. KARLAN: Thank you, Justice Stevens, and may  
it please the Court:

Yesterday in Koons Buick against Nigh, this  
Court emphasized once again that statutory interpretation  
is a holistic process based on common sense, that the  
reading of the statute should look at all the words to  
avoid a passing strange or an anomalous result when the  
text does not dictate it and the statutory history  
suggests otherwise.

JUSTICE SCALIA: That was a case I dissented in,  
wasn't it?

MS. KARLAN: Yes, but actually, Justice Scalia,  
I think even you will find our case more appealing.

JUSTICE KENNEDY: Yes, but -- but it is true you  
have a strong textual --

MS. KARLAN: We have an excellent textual  
argument.

JUSTICE KENNEDY: I was a little bit surprised

1 at your opening because it seems to me you have a strong  
2 textual argument you're now defending.

3 MS. KARLAN: We do. A holistic reading of the  
4 text shows that section 522(d)(10)(E) of the Bankruptcy  
5 Code --

6 JUSTICE KENNEDY: What does a holistic reading  
7 mean? Can you stay within the --

8 MS. KARLAN: Absolutely.

9 JUSTICE KENNEDY: -- text and still be holistic?

10 MS. KARLAN: I'm not going to look outside the  
11 text at all.

12 A holistic reading of section 522(d)(10)(E) of  
13 the Bankruptcy Code, which is on -- in the petitioners'  
14 brief at pages 1 through 2 --

15 JUSTICE STEVENS: What does the word holistic  
16 mean?

17 (Laughter.)

18 MS. KARLAN: I think it means read all the words  
19 in the sense that makes the most sense to you rather than  
20 plucking words at random or rather than looking at a word  
21 artificially. For example, when you look at a phrase like  
22 on account of in the Bankruptcy Code, as the Court did in  
23 North LaSalle, account means a lot of different things,  
24 but there it clearly meant because of, as it does in this  
25 statute.

1 JUSTICE KENNEDY: So the antonym would be  
2 parsimonious or something like that?

3 MS. KARLAN: I think it'd be partial, but I'm  
4 not sure.

5 JUSTICE KENNEDY: Well, let -- let me ask --

6 MS. KARLAN: Sure.

7 JUSTICE KENNEDY: -- ask you this. The -- the  
8 statute does say that the right to receive a payment is on  
9 account of age, and that seems to me to be an argument  
10 somewhat in respondent's favor because the -- the payment  
11 has to be triggered by the age, if you read it that way,  
12 and it seems to me that's a fair way to read it.

13 MS. KARLAN: Yes, and I think payments are  
14 triggered by age because section 522(d)(10)(e) is a  
15 statute eminently about the protection in bankruptcy of  
16 retirement payments. For individuals --

17 JUSTICE O'CONNOR: Well, the problem for the  
18 court below was that the person covered can ask for it in  
19 a lump sum and pay a penalty.

20 JUSTICE KENNEDY: Right, and that's not --

21 JUSTICE O'CONNOR: And -- and that isn't then on  
22 the basis of age. Am I right? Is that -- that was the  
23 problem the court had below.

24 MS. KARLAN: Yes, that's the problem the court  
25 had below. I think it's an illusory problem for the

1 following reason.

2           It's clear that the right to receive full  
3 enjoyment of payments under an IRA does not attach until  
4 one of the triggering events occurs. The trigger events  
5 are age 59 and a half, disability, illness, or for the  
6 estate, death. And that's the right that we're talking  
7 about here, and that's why --

8           JUSTICE SCALIA: Well, when you say full  
9 enjoyment, you -- you think when -- when I'm taxed on  
10 something, I -- I don't have full enjoyment of it? The  
11 only thing triggered by age, as far as I can tell -- the  
12 only thing triggered by age -- is your obtaining of a tax  
13 benefit. That's all. Once you reach a certain age, you  
14 can withdraw it without -- without paying the 10 percent  
15 tax.

16           MS. KARLAN: That's correct, but the 10 percent  
17 tax here is designed and does, in fact, operate as a  
18 deterrent and a penalty.

19           JUSTICE SCALIA: Well, I'm sure it does, but --  
20 but it's -- it's hard to accept the notion that simply  
21 because after a certain age I get a tax benefit, I'm  
22 receiving the money on account of my age. That doesn't  
23 make any sense to me.

24           MS. KARLAN: Well, Justice Scalia, the way that  
25 I would view that is prior to 59 and a half, you pay a

1 penalty. And Congress put that penalty in there because  
2 the holistic sense, the full reading of section  
3 522(d)(10)(e) is it is designed to protect retirement  
4 savings, replacement income of the elderly, the disabled,  
5 or ill people, once they get to the point where those  
6 triggering events, which are in 522(d)(10)(e), occur.  
7 Those are the same triggering events --

8 JUSTICE GINSBURG: Ms. Karlan, the -- as long as  
9 this money was in the plan, it was shielded from  
10 bankruptcy, and there are -- there was not unlimited  
11 access even with the penalty when it was in the plan. One  
12 thing that I don't know and may be of some significance,  
13 did the Rouseys have a chance, even though they lost their  
14 employment, to keep their money in the plan where it would  
15 be shielded from bankruptcy or did they have to roll it  
16 over?

17 MS. KARLAN: Northrop Grumman's policy is to  
18 require individuals who leave the company's employment to  
19 roll their pension plans into an IRA. The Rouseys tried  
20 to get work in Arkansas when they moved there. Had they  
21 gotten a job there that they were able to keep, which they  
22 were unable to do because of their health, they could have  
23 rolled that money back into an undeniably, completely  
24 exemptible pension plan.

25 JUSTICE GINSBURG: Another employer's plan.

1 MS. KARLAN: That's correct.

2 JUSTICE GINSBURG: But they could not have kept  
3 it in this employer's plan?

4 MS. KARLAN: No. This employer did not permit  
5 individuals to keep the money in the plan. They were told  
6 they had to remove the money when they lost their jobs.

7 JUSTICE GINSBURG: That was a term of the plan  
8 that it -- you can remain in it only so long as you're  
9 employed?

10 MS. KARLAN: Apparently so.

11 JUSTICE SCALIA: Are there any other plans that  
12 are -- are entities clearly covered by the statute in  
13 which the only effect of age is to enable you to avoid a  
14 tax?

15 MS. KARLAN: Yes, Your Honor.

16 JUSTICE SCALIA: All right. Well, then --

17 MS. KARLAN: Let me give you a couple --

18 JUSTICE SCALIA: -- then you might persuade me.

19 MS. KARLAN: Let me give you a couple of  
20 examples --

21 JUSTICE SCALIA: Okay.

22 MS. KARLAN: -- that I think will be quite  
23 familiar. A 401(k) plan allows you to get access to money  
24 before you turn 59 and a half on account of hardship, and  
25 you pay a 10 percent tax penalty if you do so.



1           The Federal Government's thrift savings plan for  
2   Federal employees allows you to take a loan out of the  
3   plan and to pay the interest back into your own account  
4   before you turn 59 and a half, thereby essentially giving  
5   you free use of the money. If you don't pay the loan  
6   back, it's then treated as a -- as a distribution, and you  
7   pay the 10 percent tax penalty on it.

8           So that if you read this statute to -- not to  
9   include IRA's, to deny exemption to IRA's, you read this  
10   statute to deny exemption to virtually all of the modern  
11   forms of defined contribution pension plans or savings  
12   plans.

13           JUSTICE O'CONNOR: Yes. That was what I was  
14   going -- aren't most of the pension profit-sharing, stock  
15   bonus plans, and annuities similar to the IRA's in terms  
16   of allowing withdrawal on the payment of a penalty?

17           MS. KARLAN: Absolutely, Your Honor.

18           JUSTICE O'CONNOR: Yes. I thought they were all  
19   in the same boat. So what the effect of this rule is --  
20   of the Ninth Circuit is that they would all fail to  
21   qualify under the bankruptcy --

22           MS. KARLAN: Yes, that's correct. You would  
23   render section 522(d)(10)(e) essentially a nullity.

24           JUSTICE O'CONNOR: Oh, it's the Eighth Circuit.  
25   Excuse me.

1 MS. KARLAN: Yes. I -- I can see why you might  
2 have thought it was the Ninth Circuit.

3 (Laughter.)

4 JUSTICE SCALIA: It -- it might be wrong anyway.

5 (Laughter.)

6 MS. KARLAN: Yes, yes.

7 JUSTICE BREYER: What is the percentage amount  
8 of the payments that are taken out of all IRA plans before  
9 people are 59 and a half?

10 MS. KARLAN: Well, in the Cilek case from the  
11 Seventh Circuit, which is cited in our brief, the court  
12 there cited statistics that suggested it was between 1.2  
13 and 1.7 percent of funds in IRA's were removed early under  
14 the penalty process.

15 JUSTICE BREYER: And the -- the payment here --  
16 it says -- the statute uses the word payment. So suppose  
17 you simply have an IRA plan but you don't take money out  
18 of it. Then is it exempt from bankruptcy?

19 MS. KARLAN: It would be because it's the right  
20 to the future payments and not just the present payments,  
21 Justice Breyer.

22 JUSTICE BREYER: So -- so -- but I'm trying --  
23 what I'm trying to figure out is if a person were to take  
24 -- just reading it in English, it sounds as if a person  
25 were to take the plan out before he's 59 and a half and

1 pay the penalty, that that amount that he took out would  
2 not be a -- a payment because of age, but one that he took  
3 out after he's 59 and a half and didn't pay the penalty  
4 would be.

5 MS. KARLAN: That's correct, Justice Breyer.  
6 But in order to protect the ability to take money out  
7 after someone turns 59, you have to protect the corpus of  
8 the IRA now because otherwise, when he turns 59 and a  
9 half, there won't be any money there for him to take out.  
10 And that's why the exemption extends not just to present  
11 payments, as the Third Circuit erroneously held, but also  
12 to the corpus when it is necessary for the support of the  
13 debtor. And I can't emphasize --

14 JUSTICE O'CONNOR: Ms. Karlan, let me ask  
15 something about that very point because the statute says  
16 that to the extent reasonably necessary for the support of  
17 the debtor it's allowable.

18 MS. KARLAN: Yes, Justice O'Connor.

19 JUSTICE O'CONNOR: Are you aware of cases where  
20 the bankruptcy court has said, well, you don't need all  
21 that money? That's a big plan. You don't need all that.  
22 We'll just let you deduct X amount.

23 MS. KARLAN: Absolutely, Justice O'Connor. We  
24 cite a number of them in both the opening brief and in the  
25 yellow brief on pages 19 through -- to 20, I think is

1     where we -- where we talk about --

2             JUSTICE GINSBURG: Can we take this concrete  
3 case? Hers was something over \$12,000; his, something  
4 over \$42,000.

5             MS. KARLAN: Yes.

6             JUSTICE GINSBURG: What was the claim here as to  
7 -- was part or all of that -- it would be some \$54,000.

8             MS. KARLAN: The claim was all that all of that  
9 was necessary. If I could give an example that I think  
10 Justice O'Connor might find instructive here. When a  
11 debtor, for example, is 40 years old, they generally  
12 require turnover of the entire IRA because people have  
13 time to earn the money back again. When the debtor has  
14 other retirement savings, for example, in a case from  
15 Virginia called Abate, because the person also had a  
16 401(k) plan, they were required to turn over the entire  
17 IRA. When a debtor is able to work, even if the debtor is  
18 in his or her 50's, courts will often require exclusion of  
19 at -- will also require turnover of at least part of the  
20 IRA. In this case --

21             JUSTICE KENNEDY: What -- what do the courts do  
22 if they say, well, my client might be ill or something  
23 like that? It seems to me --

24             MS. KARLAN: Well, if the client is ill now,  
25 they get to keep it --

1 JUSTICE KENNEDY: No, no. They -- they say my  
2 client is able-bodied now, but we -- we need something  
3 because -- I don't know -- there's a history of family  
4 illness or something.

5 MS. KARLAN: There isn't a reported case that  
6 talks about the possibility of future illness as a reason  
7 of exempting the money.

8 JUSTICE BREYER: It's -- I'm trying to figure  
9 out how -- how -- what the theory is. Is -- you say I  
10 have a right to receive payments because of age. And you  
11 say, well, here I have a body of money and 99 percent  
12 comes out of it after you're 60. 1 percent comes out  
13 before. So it's very tempting to say that that corpus  
14 there, of course, is a body of money that you're going to  
15 have a right to receive because of age because the  
16 practical effect of the 10 percent is -- is -- stops the  
17 -- the younger person getting the money.

18 So does the case then turn on that? I mean,  
19 suppose -- suppose it were a 3 percent penalty and 40  
20 percent of the people took out the money before they were  
21 60 or a 1 percent penalty and 80 percent did it. Then  
22 should I reach the other result? I'm just trying to think  
23 of how does this analysis work. What's the right  
24 analysis?

25 MS. KARLAN: I would say at the 1 percent and 80

1 percent of the people are taking the money out, it  
2 wouldn't operate really as a retirement plan anymore.

3 But if I can give another statistic that might  
4 be helpful in thinking about this. 18 percent of the  
5 participants in large 401(k) plans who are under the age  
6 of 50 are taking loans out against those plans today.

7 JUSTICE BREYER: What percent?

8 MS. KARLAN: 18 percent in one of the surveys.  
9 And yet, those plans are undeniably, absolutely exempt  
10 under the bankruptcy --

11 JUSTICE SCALIA: Well, they're taking out loans  
12 against it. They're -- they're not withdrawing the money.

13 MS. KARLAN: Well, but the loans because -- for  
14 example, in the Federal thrift savings plan, the interest  
15 is being paid back into your own account, it's essentially  
16 as close to taking out the money as you can get.

17 JUSTICE KENNEDY: I still don't have your answer  
18 to the problem that bothered me at the first. How -- how  
19 do you reconcile your positions with on account of  
20 language? If the -- if your clients can take the money --  
21 just take the money out of the IRA at any time, then why  
22 is it on account of age?

23 MS. KARLAN: It -- it's not the -- if you look  
24 at the statute -- and let me just work my way through it  
25 with you. It's the right to a payment under a stock

1 bonus, profit-sharing, annuity, or similar plan on account  
2 of illness. And the question is what does on account of  
3 modify there. I think the most natural and sensible  
4 reading of the statute is a plan that is because of age, a  
5 plan that is because of disability, and the like.

6 JUSTICE KENNEDY: So you say that payment  
7 doesn't -- on account of doesn't modify payment.

8 MS. KARLAN: I don't -- I don't think you need  
9 to read it that way, and I think the most sensible reading  
10 here, especially given that the statute --

11 JUSTICE KENNEDY: Well, I -- I think the logical  
12 reading is that it -- it modifies payment.

13 MS. KARLAN: Well, I -- I'm not sure that it  
14 does, but even if it did, Your Honor --

15 JUSTICE SCALIA: It's too holistic for me. What  
16 -- what does it -- what does it modify? I mean, if you  
17 had to diagram it, on account of goes to what noun?

18 MS. KARLAN: Well, this is again -- I know you  
19 dissented yesterday, but this is a less than meticulously  
20 crafted statute.

21 JUSTICE SCALIA: No. I thought I was being  
22 holistic yesterday, to tell you the truth.

23 (Laughter.)

24 MS. KARLAN: Okay.

25 JUSTICE SCALIA: But --

1 MS. KARLAN: Well --

2 JUSTICE SCALIA: -- but what does on account of

3 modify?

4 MS. KARLAN: I think what on account of modifies

5 here is the kind of plan out of which the payment is

6 coming.

7 JUSTICE SCALIA: Where -- where is that noun?

8 MS. KARLAN: There are a variety of plans, stock

9 bonus, pension --

10 JUSTICE SCALIA: The right to receive a payment

11 under a stock bonus, pension --

12 MS. KARLAN: Yes.

13 JUSTICE SCALIA: -- profit sharing, annuity, or

14 similar plan or -- or contract. It's a plan on account of

15 illness, an annuity?

16 MS. KARLAN: Plans --

17 JUSTICE SOUTER: Why -- why isn't it a right on

18 account of?

19 JUSTICE SCALIA: It's the right on account of.

20 MS. KARLAN: Well, I think you can read it

21 either way and you'll get to exactly the same result. So

22 let me read it the way that you've been reading it, which

23 is if you want to protect the ability of people who have

24 IRA's to withdraw money on account of age, you have to

25 protect the IRA now or there will be no money in it for



1     them to exercise their right to withdraw on account of  
2     age.

3             JUSTICE KENNEDY:  Yes, but -- but there still is  
4     a right to take payments at any time.

5             MS. KARLAN:  Justice -- Justice Kennedy, we  
6     don't believe --

7             JUSTICE KENNEDY:  So -- so then you're --  
8     you're --

9             MS. KARLAN:  -- that that's actually a right.

10            JUSTICE KENNEDY:  Under that, you're giving the  
11     -- the language that follows it no meaning.

12            MS. KARLAN:  No, Justice Kennedy, I don't think  
13     that's what I'm doing here, and the reason I don't think  
14     that's what I'm doing is because this statute clearly  
15     refers to IRA's by name as one of the plans that's  
16     entitled to exemption.

17            JUSTICE BREYER:  But as purely English -- as  
18     purely English, I read it as saying it's a right.  What is  
19     that right?  The right is a right to receive a payment on  
20     account of age.  That's the -- a plan.  That's the right.

21            Now, your argument, I take it, was -- is that  
22     yes, it's true you also have a right under certain  
23     conditions to take it without respect to age.  So what we  
24     have here is a plan that gives you both kind of rights.

25            MS. KARLAN:  That's correct.

1 JUSTICE BREYER: It's a kind that gives you a  
2 right to take it with a penalty and a right to take it  
3 because of age without a penalty. And thus, the question  
4 is, is that kind of plan which gives you both kind of  
5 rights covered? And the language doesn't answer it.  
6 So --

7 JUSTICE KENNEDY: But under Justice Breyer's  
8 hypothetical, that's just like a savings account.

9 JUSTICE SCALIA: Yes.

10 MS. KARLAN: No.

11 JUSTICE SOUTER: No, because the savings account  
12 doesn't have -- I mean, the savings account doesn't have  
13 the -- the penalty. Isn't your argument that you've got  
14 to read the right as meaning a right without penalty,  
15 because if you don't read it that way, then every one of  
16 these other retirement instruments is likewise going to  
17 fail? Isn't that your -- your strong point?

18 JUSTICE SCALIA: That's your strong point.

19 MS. KARLAN: That's correct. That's -- that's  
20 our strong point and we're sticking with it.

21 (Laughter.)

22 JUSTICE SCALIA: Right. Right -- it's not a  
23 right if you have to pay a penalty for it.

24 MS. KARLAN: That's correct. It's not a right,  
25 as we say in the reply brief, to park on the sidewalk

1     because if you pay the parking ticket, you can park there.

2             JUSTICE SCALIA:   Right.

3             MS. KARLAN:   And I think no matter how --

4             JUSTICE SCALIA:   That's a good argument.   I like

5     that.

6             MS. KARLAN:   Thank you.

7             (Laughter.)

8             MS. KARLAN:   No matter how you read the statute,

9     it's designed to cover IRA's, and any reading of the

10    statute that ends up not covering IRA's will also not

11    cover many of the other --

12            JUSTICE GINSBURG:   Why didn't Congress just put

13    in IRA's along with the other things?

14            MS. KARLAN:   They did, Justice Ginsburg.   They

15    did in the last line of the statute.

16            JUSTICE GINSBURG:   Yes, but that's sort of an

17    oblique way to get it there.   I mean, why didn't they put

18    it together with the other string of plans?

19            MS. KARLAN:   Well, my best guess as to why they

20    didn't do that is they started drafting the exemptions

21    statute in 1973 and they enacted IRA's in 1974, so they

22    stuck it in at the end of the list.   That's my best guess.

23            JUSTICE SOUTER:   What --

24            JUSTICE SCALIA:   What your -- what your

25    opponents say is that the -- the thing at the end doesn't

1 prove anything because they're willing to acknowledge that  
2 some IRA's can be so structured that you cannot withdraw  
3 until -- until you reach a certain age. And if they're  
4 structured that way, they would be covered. So you had to  
5 mention 408 in the -- in the exceptions. What's wrong  
6 with that argument?

7 MS. KARLAN: Well, what's wrong with that,  
8 Justice Scalia, is that all IRA's are designed and they're  
9 administered on forms that the Internal Revenue Service  
10 sets out and you buy the forms to allow for early  
11 withdrawal. So under their theory, there has -- there is  
12 not now and there has never been a single IRA anywhere in  
13 the United States --

14 JUSTICE SOUTER: Well --

15 MS. KARLAN: -- that had that inability to take  
16 the money out subject to penalty prior to the age 59 and a  
17 half.

18 JUSTICE SOUTER: Do -- do we know that? I mean,  
19 couldn't someone -- I -- I don't think this is a very  
20 plausible basis for construing the statute, but just as a  
21 technical matter, couldn't someone go to the bank or  
22 brokerage firm and say I want to set up an IRA, but I want  
23 the IRA to be, in -- in effect, like an irrevocable trust  
24 in which withdrawals can only be made on certain, specific  
25 conditions? And couldn't someone, using both the IRA

1 mechanism and a State irrevocable trust document, create  
2 an IRA that would be as restricted as -- as the circuit  
3 suggested it might be?

4 MS. KARLAN: I don't necessarily think so for  
5 the following reason. IRA's are off-the-rack products.  
6 They're a basic consumer product that 40 million people  
7 buy. People don't usually negotiate the terms.

8 If you did negotiate the terms, though, here's  
9 the second problem. Anytime you deviate from the form  
10 that the Internal Revenue Service gives you, which also  
11 gives you these rights to withdraw early subject to  
12 penalty, you run the risk that your plan will then be held  
13 to be a nonqualifying plan under section 408 of the tax  
14 code. You then lose the ability to deduct the  
15 contributions going in. You then lose the ability to  
16 defer the payments on the income as it accrues in the  
17 account.

18 Now, to answer the last part of your question,  
19 one of the things that has occurred over the last, say, 5  
20 to 10 years is more and more States are passing laws that  
21 essentially protect IRA's in bankruptcy and out, as a  
22 matter of State law, from any attachment by creditors.  
23 Why do they do that? Because they recognize that IRA's  
24 are a fundamental piece of the retirement system today.

25 JUSTICE GINSBURG: And some don't. The -- the

1 State systems vary.

2 MS. KARLAN: That's correct, but only four  
3 States offer no protection to IRA's from creditors as  
4 opposed to --

5 JUSTICE GINSBURG: As opposed to how many who  
6 do?

7 MS. KARLAN: 46 States offer some kind of  
8 protection. 23 States protect them without limit in  
9 bankruptcy and out. 6 of them protect them inside of  
10 bankruptcy using the State exemptions as long as the  
11 amount is reasonable and necessary for the debtor's  
12 support.

13 JUSTICE GINSBURG: Well, that's what -- with the  
14 purpose that we're talking about now --

15 MS. KARLAN: That's correct.

16 JUSTICE GINSBURG: -- if it's only 6 that, faced  
17 with a bankruptcy, would shelter the IRA.

18 MS. KARLAN: No. No. 23 of them would protect  
19 all IRA's. 6 would protect all IRA's if the money in them  
20 is necessary to the debtor's support, an additional 6. 6  
21 more would protect all the money in an IRA as long as it  
22 was deposited 120 days or a year or 3 years before the  
23 debtor filed for bankruptcy. 3 of them will protect all  
24 IRA's up to a dollar amount. In Nevada, the dollar amount  
25 is \$500,000. 8 States use, as their State exemption law,

1 an IRA that -- a statute that has exactly the same  
2 language as the Federal statute. 6 of those State  
3 statutes have been interpreted by Federal courts to  
4 protect IRA's.

5 JUSTICE GINSBURG: But here there was no choice  
6 of picking up on the State?

7 MS. KARLAN: There's a -- there's a weird  
8 anomaly in Arkansas, Your Honor, which is Arkansas law  
9 does, in fact, protect IRA's, but the Federal bankruptcy  
10 courts in Arkansas have interpreted that law only to  
11 protect the IRA up to \$500 because of a provision in the  
12 Arkansas constitution, article 9, section 2, that means  
13 that you can only save up to \$500. So any bankrupt person  
14 in Arkansas who wants to keep any money in his -- in his  
15 IRA has to elect the Federal exemptions rather than  
16 electing the State exemptions.

17 JUSTICE GINSBURG: And one train that we didn't  
18 finish before. You were explaining that in this case the  
19 entire \$55,000 -- that entire sum would be needed -- would  
20 be necessary for the support of the debtors.

21 MS. KARLAN: That's correct. The bankruptcy  
22 court did not rule on our claim that it was all reasonably  
23 necessary because they decided first that IRA's didn't  
24 come within the meaning of section 522.

25 JUSTICE GINSBURG: But you -- that was your

1 claim, and I --

2 MS. KARLAN: Yes, Your Honor.

3 JUSTICE GINSBURG: How did you come to that  
4 conclusion, that the entire amount?

5 MS. KARLAN: Well, if you take, say, \$55,000 and  
6 you ask what sort of annuity could you purchase when you  
7 hit age 59 and a half with that money, it will be an  
8 annuity that, I would guess -- you know, I -- I hate to do  
9 math in my head like this. I'd guess it would throw off a  
10 couple of hundred dollars a month in additional income.

11 And so if you ask will the Rouseys need that  
12 money for their support, I think the answer is yes because  
13 their only other support --

14 JUSTICE GINSBURG: Oh, yes.

15 MS. KARLAN: -- is Social Security and a \$2,000  
16 a month defined benefit plan that will never go up and  
17 against which their Social Security will be offset. So  
18 when they start becoming eligible, as Mr. Rousey is about  
19 to be, for Social Security, that defined benefit plan  
20 reduces their benefits. So if the Rouseys are to have an  
21 old age in which they can afford to live in any kind of  
22 reasonable circumstance at all, they need this money.

23 JUSTICE SOUTER: May I go back and just nail  
24 down one loose end in -- in an answer that you -- you gave  
25 to my question, can you set up a kind of irrevocable? I



1     assume clearly from what you say is that there is not only  
2     no statute, but no IRS reg or ruling to the effect that  
3     you can make your IRA terms more restrictive without  
4     jeopardizing your qualification.

5             MS. KARLAN: I was unable to find one, Your  
6     Honor.

7             JUSTICE SOUTER: Okay.

8             MS. KARLAN: I'd like to reserve the remainder  
9     of my time.

10            JUSTICE SCALIA: Why didn't the Government come  
11     in here, just as a matter of curiosity? We don't have an  
12     amicus brief here from the Government, do we?

13            MS. KARLAN: I -- no, we do not have one, and I  
14     don't --

15            JUSTICE SCALIA: The Government has no position  
16     on the matter.

17            MS. KARLAN: Well, I -- I don't think they've  
18     taken a position here. I will say that in Patterson  
19     against Shumate, they referred to IRA's in a footnote in  
20     their brief, I believe, as pension plans under section  
21     408.

22            JUSTICE SCALIA: There -- they never go  
23     bankrupt, so the position they usually take is against  
24     any exemption from the --

25            (Laughter.)

1 MS. KARLAN: Well -- well, that's correct. The  
2 United States trustee may have wanted them to -- I'd like  
3 to reserve the remainder of my time.

4 JUSTICE STEVENS: Ms. McKiever.

5 ORAL ARGUMENT OF COLLI C. MCKIEVER

6 ON BEHALF OF THE RESPONDENT

7 MS. MCKIEVER: Justice Stevens, may it please  
8 the Court:

9 Pursuant to section 522(d)(10)(e) of the  
10 Bankruptcy Code, a debtor's right to receive a payment is  
11 not exempt unless two requirements are met. First, the  
12 right to receive the payment must be on account of  
13 illness, disability, death, age or length of service, and  
14 the right must come from a specified similar plan or  
15 contract. Because neither of those elements is satisfied  
16 in this case, the petitioners' IRA's are not exempt.

17 JUSTICE SCALIA: Is it -- is it the case that  
18 other plans that are clearly covered by the text of this  
19 statute also permit early withdrawal for certain reasons?

20 MS. MCKIEVER: Yes and no, and let me explain  
21 that. Yes, they do permit withdrawals based upon certain  
22 factors. Those are enumerated based -- based upon each  
23 individual plan. However, they do not permit withdrawals  
24 for any reason at any time for any purpose.

25 JUSTICE SCALIA: Not a single one of them.

1 MS. McKIEVER: Not a single one of them. Now,  
2 of course, I've not read every plan ever created, but none  
3 of the plans that I have ever seen, as the specified  
4 plans, the pension plans, the profit-sharing plans, any of  
5 those, allow withdrawal for any reason at any time.

6 JUSTICE SCALIA: And you'd say that if one of  
7 them did, it would also not be covered.

8 MS. McKIEVER: That's correct. It -- it is  
9 thought --

10 JUSTICE BREYER: What -- what --

11 JUSTICE SOUTER: I take it -- in -- in answering  
12 Justice Scalia, I take it from what you didn't say that  
13 none of the -- we'll call them kind of the paradigm  
14 example plans are, however, as -- as restricted as the  
15 language in this -- the statute would suggest that it had  
16 to be if you read it in a -- in a very literal way.

17 MS. McKIEVER: There are --

18 JUSTICE SOUTER: In other words, they're all a  
19 little bit sinful, at least, even if they're not as sinful  
20 as -- as you say the -- the 401 -- the -- the IRA is.

21 MS. McKIEVER: That -- that is correct. The --  
22 there probably are plans out there -- once again, there  
23 are so many plans. And those are created by financial  
24 institutions, by employers, by different entities. So  
25 therefore there are thousands of variations of those.

1 JUSTICE BREYER: Now, why? Okay. Once you're  
2 down that road, you have conceded, as you must, that a  
3 plan that says you get the money because of age but you  
4 also can get the money without respect to age in certain  
5 circumstances can be a plan covered by the act. Now,  
6 that's the kind of a plan that's right in front of you.  
7 So, therefore, literally it falls just as much within the  
8 language as the other that you want to say even though  
9 that is literally true, this plan is very different from  
10 the others in terms of the purposes of the act. That's  
11 what I would like to hear because to me, I'm not so moved  
12 by holistic as I am by purposes, which is part of  
13 holistic.

14 So -- so the -- the point that I would like to  
15 know is why, since ordinary people think of IRA's as  
16 pensions -- I do. I think of it that way. I don't know  
17 much about it. It's designed to help in the future, help  
18 when you're old and sick. But there is this extra thing  
19 in it which you point to. So why, in terms of purposes is  
20 this different from the others?

21 MS. McKIEVER: This is different because this is  
22 the only kind of plan where you can access the funds at  
23 any time for any purpose. It is also --

24 JUSTICE BREYER: I know that, but -- but -- and  
25 you do it with a penalty. We agree about the facts.

1 MS. McKIEVER: That's correct.

2 JUSTICE BREYER: But I want to know why that  
3 difference makes a difference in a world where only 1 or  
4 less 2 percent of the people do access it before they're  
5 60, 59 and a half.

6 MS. McKIEVER: Because the right to -- to  
7 receive the payment, the right to access the money at any  
8 time exists no matter if it is exercised or not, and it  
9 does not meet the language of the statute. The statute  
10 very specifically --

11 JUSTICE BREYER: No, no. I -- you've missed my  
12 point and I'm sorry. I put you on the wrong track with my  
13 following up. I shouldn't have.

14 MS. McKIEVER: I'm sorry. Yes.

15 JUSTICE BREYER: My question is we all agree  
16 that there can be plans where you can get the money not  
17 having to do with age, and they fall within the language  
18 of the act, and indeed, you say some are covered. But  
19 this one you say is worse than the others in terms of the  
20 purposes of the act, and that's what I want to hear why.

21 MS. McKIEVER: Because there is no causal  
22 connection between any of the factors that are enumerated  
23 in the statute and the right to receive the money. And  
24 that is --

25 JUSTICE SCALIA: I --

1 JUSTICE STEVENS: May I ask this question?

2 Supposing instead of a 10 percent penalty, there was an  
3 absolute prohibition, would you agree -- on getting the  
4 money before you're 59 and a half, would then that  
5 qualify?

6 MS. McKIEVER: Absolutely, yes, it would.

7 JUSTICE STEVENS: Now, what if there were a 50  
8 percent penalty?

9 MS. McKIEVER: Clearly, there's a point at which  
10 it would qualify as a prohibition more than just --

11 JUSTICE STEVENS: And what is it that makes it a  
12 prohibition? Is it -- is it because the purpose is to  
13 deter withdrawals, or it is that it becomes economically  
14 unacceptable? What -- what is the reason for drawing the  
15 line somewhere above 10 percent?

16 MS. McKIEVER: The reason for drawing the line  
17 is because at 10 percent, as the Eighth Circuit has stated  
18 in -- in the Huebner case, it -- it said that it's a  
19 minimal penalty. However, there is still the unfettered  
20 access that's available.

21 JUSTICE STEVENS: But what is the purpose of  
22 imposing any penalty at all?

23 MS. McKIEVER: I would assume as a disincentive  
24 to -- to withdraw, but it's clearly not a prohibition,  
25 such as the -- the parking --

1 JUSTICE STEVENS: But 50 percent would not be a  
2 prohibition and neither would 90 percent.

3 MS. McKIEVER: It would not be a prohibition,  
4 but it would operate more as a prohibition than 10  
5 percent.

6 JUSTICE STEVENS: So it's a matter of degree  
7 rather than a difference in kind.

8 MS. McKIEVER: Clearly that -- it's a very  
9 difficult line to draw. I -- I can't make that call at  
10 this moment, but --

11 JUSTICE STEVENS: It seems to me the easiest  
12 black letter rule is no tax or some tax. I mean, if it  
13 was totally free like an ordinary bank account, then you'd  
14 be dead right. But the fact that for a -- an important  
15 purpose there is a 10 percent penalty put in seems to me  
16 puts it into the category of things that are -- you're not  
17 supposed to have an absolute right to get.

18 MS. McKIEVER: But the -- the hallmark  
19 difference here is that it -- it is the only type of  
20 account that you can access paying the penalty for any  
21 reason --

22 JUSTICE SCALIA: I assume --

23 MS. McKIEVER: -- regardless of the specified  
24 reason.

25 JUSTICE SCALIA: -- that -- that your answer to

1 Justice Breyer as to why that makes a difference with  
2 regard to the purpose of the statute is that the purpose  
3 of the statute is to make sure that people have money for  
4 their retirement, and that if you can withdraw it for any  
5 reason whatever, there is no security that that money will  
6 be there for their retirement; whereas if you limit the  
7 reasons to sickness and -- and a certain other number of  
8 emergency reasons, the chances the money will be there for  
9 the retirement are much higher.

10 MS. McKIEVER: Well, that -- that's --

11 JUSTICE SCALIA: Isn't that the answer?

12 JUSTICE BREYER: But if that's the answer,  
13 excellent. So now we have --

14 (Laughter.)

15 JUSTICE BREYER: -- let's say --

16 MS. McKIEVER: Thank you, Justice Scalia.

17 JUSTICE BREYER: Let's try -- let's try a  
18 million percent tax and nobody in history has ever  
19 withdrawn the money. Now, would -- that you would say  
20 would fall within this.

21 MS. McKIEVER: Yes.

22 JUSTICE BREYER: Fine, yes.

23 MS. McKIEVER: Yes.

24 JUSTICE BREYER: Okay. Now, if that would fall  
25 within this, going back to Justice Stevens, because that



1 operates as a bar to prevent the bad world that Justice  
2 Scalia mentioned, why doesn't a tax that operates as a bar  
3 that's good enough to stop 98.5 percent of the people from  
4 withdrawing their money and having nothing left for old  
5 age -- why isn't that just as good as the million percent  
6 tax in a world that is imperfect?

7 MS. McKIEVER: Because clearly the -- the access  
8 of money and the ability to use it prior to retirement,  
9 just as -- as Justice Scalia just stated, that allows the  
10 -- the debtors to -- to access freely for any purpose,  
11 clearly not showing that -- that it would be for  
12 retirement purposes.

13 JUSTICE SOUTER: But attachment of the --

14 JUSTICE SCALIA: All right, but it's acquired.  
15 Say -- say retirement, not old age. I mean, you know, 60  
16 -- it's not that bad --

17 (Laughter.)

18 JUSTICE BREYER: 93.

19 JUSTICE SOUTER: If -- if that is going to be  
20 your criterion, the -- the total freedom for any purpose,  
21 then why, if we accept your argument, why -- why don't we  
22 face sort of a daunting run or the courts face sort of  
23 daunting future? Because the -- the question then is  
24 going to be, well, what purposes are sufficiently close to  
25 old age to -- to allow for a continued exemption and how

1 free may the purposes be before a plan falls into the IRA  
2 category. You told us a few moments ago -- and I'm sure  
3 you -- you were right -- that the kind of the paradigm  
4 example plans vary enormously depending on the terms in  
5 which employers set them up. So if -- if we say that the  
6 -- the dividing line is going to be between plans under  
7 which withdrawal can be for any purpose versus plans in  
8 which withdrawal is going to be somehow limited, then  
9 we're going to have to litigate an awful lot of plans.  
10 Aren't we?

11 MS. McKIEVER: Not necessarily. The -- the line  
12 that we're really looking to is that there has to be a  
13 direct causation factor between one of the five specified  
14 factors such as on -- on account of factors, age,  
15 disability, death, length of service, and the right to  
16 receive the payment.

17 JUSTICE O'CONNOR: Well, but typically these  
18 plans like 401(k) plans permit hardship withdrawals, and  
19 other plans that are mentioned in the act allow  
20 withdrawals for medical reasons or to buy housing or  
21 something like that. I mean, you -- we would just have  
22 endless cases trying to figure out what qualifies and what  
23 doesn't. It seems like such a hard line for you to try to  
24 draw here.

25 MS. McKIEVER: Well --

1 JUSTICE O'CONNOR: And every plan that I know of  
2 allows withdrawal if you terminate employment.

3 MS. McKIEVER: And that's typically --

4 JUSTICE O'CONNOR: In fact, that's what happened  
5 to these people.

6 So I just don't see how your argument is going  
7 to work.

8 MS. McKIEVER: Well, the -- the ability to  
9 access the funds, oftentimes with termination, has to do  
10 with the length of service, the years in service because  
11 they accumulate and oftentimes are not payable at the full  
12 percentage. They're not fully vested until that time.

13 Also, with the -- when there are multiple  
14 factors existing in the right to receive the payments,  
15 each multiple factor can be a cause of the -- of the  
16 ability to reach the money. When there are no meaningful  
17 factors imposed, though --

18 JUSTICE O'CONNOR: Isn't it simpler to just  
19 recognize that these plans are covered despite the right  
20 to withdraw and then rely on the provision in the statute  
21 that only permits the deduction to the extent reasonably  
22 necessary for the support? I mean, that -- that seems to  
23 me a fall-back position that's provided for in the  
24 statute.

25 MS. McKIEVER: I understand that -- that may

1 appear to be correct, but the problem with that is that as  
2 -- taxpayer status is not the hallmark in this case of if  
3 it is or is not exempt. Therefore, all types of accounts,  
4 whether they are truly retirement accounts or -- or if  
5 they're just savings accounts, could potentially qualify  
6 under this statute. If -- if you want to open it up and  
7 -- and allow all kinds of accounts to be exemptible under  
8 522(d)(10)(e), the problem is that there is no limit on  
9 what can be potentially exempt under that statute.

10 JUSTICE O'CONNOR: No. Well, obviously, it's --  
11 it's governed by the statutory provision that it has to be  
12 a stock bonus, pension, profit-sharing, annuity, or  
13 similar plan or contract on account of, and so on.

14 MS. McKIEVER: That's correct.

15 JUSTICE O'CONNOR: And it includes IRA's  
16 apparently because of the last provision in the statute  
17 referring back to individual retirement acts under section  
18 408 of the Internal Revenue Code.

19 MS. McKIEVER: The section 408 reference is --  
20 does not in any way expand the exemption. In fact, it is  
21 a further condition to place on the -- the exemption.  
22 First of all, section 408 sets out only the minimum  
23 requirements for an IRA to qualify as a -- as a tax-  
24 favored plan. That --

25 JUSTICE SCALIA: Ms. -- Ms. Karlan says she

1 doesn't know of any -- of any IRA that did place a -- a  
2 restriction which would bring it within that exemption  
3 even though the ordinary IRA wouldn't be within the  
4 exemption. Do you know of any IRA, a single IRA that --  
5 that has a provision in it restricting withdrawal?

6 MS. McKIEVER: Absolutely. Those are  
7 customizable plans. Any person can go into --

8 JUSTICE SCALIA: They can, but do -- do you know  
9 that there's -- there's one out there? I don't know --

10 MS. McKIEVER: I -- I do know of several out  
11 there.

12 JUSTICE SCALIA: You didn't just draw one up for  
13 this case, did you?

14 (Laughter.)

15 MS. McKIEVER: I did not create one for this  
16 case. No, I did not.

17 But they -- they definitely exist. In fact, in  
18 the Andersen case out of the Eighth Circuit Bankruptcy  
19 Appellate Panel, the debtor had an annuity and prior to  
20 the filing of the bankruptcy petition, she elected that  
21 she would only receive periodic payments based upon her  
22 age, and that was found to be exempt by the Bankruptcy  
23 Appellate Panel because that qualified. The payments were  
24 based upon her age, and it was then a similar plan because  
25 she could not access the funds at any time but only for

1 the specified reason such as age.

2 JUSTICE SCALIA: Was that -- was that an IRA  
3 that she had? It was an IRA?

4 MS. McKIEVER: My understanding is, yes, it was  
5 under section 408(b) was -- that's my understanding based  
6 upon that case.

7 JUSTICE SOUTER: Let me -- let me ask you.  
8 Maybe this is irrelevant, but were -- were these  
9 restrictive IRA's that you're aware of set up under those  
10 terms in contemplation of bankruptcy? If the answer is  
11 no, why would anyone so restrict his -- his IRA?

12 MS. McKIEVER: I -- I do not know if that one  
13 specifically was, but no. These have not been set up  
14 through --

15 JUSTICE SOUTER: But why -- why would anyone do  
16 that? They're -- they're qualified without these  
17 restrictions. Why would anyone want to cut off his -- his  
18 rights to -- to withdraw?

19 MS. McKIEVER: Clearly to protect the money  
20 potentially for retirement and -- and just as --

21 JUSTICE SOUTER: In other words, like setting up  
22 a personal spendthrift trust?

23 MS. McKIEVER: That's --

24 JUSTICE SOUTER: I -- I want to make it tough so  
25 that I -- I will not be tempted to withdraw. Is that the

1 motivation?

2 MS. McKIEVER: Well, that would potentially be a  
3 motivation because clearly the money is there readily  
4 accessible at any time to -- to buy anything that the  
5 debtor chooses throughout their life. So someone who's 30  
6 or 40 years old can liquidate their -- their IRA account,  
7 whereas with a pension or profit-sharing plan, they don't  
8 have that kind of access --

9 JUSTICE BREYER: Should we put any weight on the  
10 title, on the name? I mean, I -- I can't but thinking  
11 it's an individual retirement account. Was Congress  
12 trying to fool people?

13 (Laughter.)

14 JUSTICE BREYER: Was the Federal Trade  
15 Commission? Should they investigate? What -- I mean, the  
16 -- the -- I think of it as an account that's basically  
17 aimed, at least Congress thought it was aimed, at  
18 retirement, which has usually to do with age.

19 MS. McKIEVER: Well, the -- the name is clearly  
20 not determinative.

21 Also, Congress in the -- in the --

22 JUSTICE BREYER: I'm reading the statute and if  
23 I were voting on it and put in the 408 reference and think  
24 of the word individual retirement account, is there any --  
25 I would have thought, knowing not that much about it, that

1 of course, they'd be included. Now, is there any  
2 indication, when people passed this, that they didn't  
3 think they would be? Any -- any reference in the terrible  
4 words, legislative history, that might shed light on it?

5 MS. McKIEVER: Yes. First of all, Congress did  
6 historically reject, first of all, just tax-favored status  
7 overall, such as what an IRA account is. An IRA account  
8 is set up just for tax-favored status. Congress set  
9 forth, instead, the (d)(10)(e) -- 522(d)(10)(e)  
10 requirements that -- that are much more stringent in the  
11 requirements of the traditional IRA.

12 JUSTICE GINSBURG: Well, are they? Because  
13 there was one statement -- I think it was in Ms. Karlan's  
14 brief -- that the Fifth Circuit said profit-sharing plans  
15 permit participants to withdraw up to the entire amount on  
16 payment of the penalty. So a profit-sharing plan, which  
17 was one of the ones on the list, seems to be substantially  
18 identical if you can also take out, whenever you like, as  
19 long as you're willing to pay the penalty.

20 MS. McKIEVER: That's a misnomer that that's a  
21 -- a right to payment. That is rather the right to borrow  
22 as a loan. And a loan is very different than a right to  
23 payment. They have the right to borrow the funds.  
24 However -- for example, in the New York Police Department  
25 pension plan, which she referenced in the reply brief, the



1 police officers can borrow up to 90 percent of their  
2 pension plan funds. However, they -- as long as they're  
3 employed there, they have to continue to repay that.

4 JUSTICE SOUTER: What -- what if they don't  
5 repay it? What's the sanction?

6 MS. McKIEVER: There is a 10 percent penalty.  
7 However, as the bankruptcy --

8 JUSTICE SOUTER: But what -- where -- where  
9 would the -- where would the principal repayment come  
10 from? I assume it would come from deducting whatever the  
11 balance was from the -- the person's account.

12 MS. McKIEVER: That would be correct.

13 JUSTICE SOUTER: I mean, we call it -- the --  
14 the loan feature then boils down to a -- a withdrawal  
15 subject to a periodic repayment obligation, but if that  
16 obligation is not satisfied, the bottom line will be  
17 exactly like a withdrawal because they will simply deduct  
18 whatever the balance is from the person's rights under the  
19 plan.

20 JUSTICE SCALIA: Plus 10 percent you say.

21 MS. McKIEVER: That's correct. However --

22 JUSTICE SCALIA: So it's just -- just like an  
23 IRA.

24 MS. McKIEVER: But -- but this is in the  
25 bankruptcy context, which makes it completely different.

1 The bankruptcy filing of a chapter VII bankruptcy is a  
2 picture in time. At the time that the debtor files the  
3 bankruptcy petition, you look to the assets that the  
4 debtor has possession of and the interest that the debtor  
5 has at that moment. There's also, for some things, a 1-  
6 year look-back period. But because it's a picture in  
7 time, it's what the -- the debtor can reach is what the --  
8 the bankruptcy trustee looks to, the types of assets that  
9 -- that the debtor owns. This is very different than the  
10 pension plan which, of course, the debtor could not have  
11 -- have exhausted to pay the creditors prior to filing the  
12 bankruptcy, but any other type of account would be there,  
13 would be present at the retirement. But because they  
14 could have liquidated their IRA's to pay off their  
15 creditors prior to filing the bankruptcy, the bankruptcy  
16 trustee steps into the shoes of that debtor and has the  
17 ability to reach the funds that the debtor can potentially  
18 reach.

19           There are other exemptions, of course, set forth  
20 in -- in section 522(d), you know, for a home or jewelry,  
21 but the assets that are not exempt are readily available  
22 to repay creditors, for -- for the benefit of the  
23 creditors. Therefore, that -- that makes it  
24 significantly --

25           JUSTICE SOUTER: Subject to the 10 percent if

1 the bankruptcy trustee does that?

2 MS. McKIEVER: That's correct. That's correct.

3 JUSTICE SOUTER: The -- the penalty still has to  
4 be paid even if it's the trustee who takes money out to  
5 pay the creditors, on your view.

6 MS. McKIEVER: That's correct. Yes, they do.  
7 They do.

8 Additionally, the petitioners' IRA's are -- by  
9 allowing unfettered access, are unlike any of the other  
10 plans because the petitioners' standard IRA is much more  
11 like a savings account. It's not any form of deferred  
12 compensation. They can't look to that to fill a salary  
13 void after they retire because the money may not be there.  
14 Unlike in the pension plans or a profit-sharing plan, they  
15 could have liquidated those funds prior to their reaching  
16 any age or any illness that -- that may befall them.

17 JUSTICE GINSBURG: But there -- there is no  
18 penalty attached to withdrawing from a savings account,  
19 and there's also no limit on the annual contribution.

20 MS. McKIEVER: That's correct. That is correct.  
21 That is correct.

22 But the -- the key here --

23 JUSTICE SCALIA: Let me just get -- get straight  
24 what -- what the -- what the universe of plans we have in  
25 front of us here. Do you assert that there are no other

1 plans, clearly covered by this statute, that permit  
2 withdrawal for any reason but with a penalty?

3 MS. McKIEVER: That's correct. None of the  
4 specified plans listed, the -- the ones enumerated.

5 JUSTICE SCALIA: Would permit withdrawal for any  
6 reason whatever provided that a penalty is paid.

7 MS. McKIEVER: That's correct.

8 JUSTICE SCALIA: None of them is like that.

9 MS. McKIEVER: None of them is like that. They  
10 all have specific factors. There has to be a causal  
11 connection between the ability to access the money.

12 Additionally, it's very important that -- that  
13 an account or plan that qualifies under the statute -- it  
14 has to be determined on a case-by-case basis. And there's  
15 no question that there are definitely IRA's that -- that  
16 could and do qualify for this exemption. It is, instead,  
17 that --

18 JUSTICE GINSBURG: Do -- do you disagree with  
19 Ms. Karlan that this is -- this is a standardized product  
20 so the people, the Rouseys of this world, really couldn't  
21 get a tailor-made IRA? They would have to take the  
22 standard product.

23 MS. McKIEVER: That's not -- that's not correct.  
24 There are many customizable products that are -- are out  
25 there. In fact, for example, when employers set up

1 different kinds of plans for their employees, they go and  
2 they can choose from many different options. For example,  
3 they can choose if they even have a -- a loan provision  
4 built into a -- a 401(k) or a pension plan, just like the  
5 IRA. They -- they can be customized because section 408  
6 only sets forth the minimum requirements for it to qualify  
7 for tax-favored status. That -- that is an Internal  
8 Revenue Code section, and it does not in any way prohibit  
9 additional factors being placed into the plan. Rather, it  
10 allows the -- the individual or the employer because some  
11 -- there are two different types of IRA's that can be set  
12 up by an employer -- to go and customize those so that  
13 they could potentially meet the statutory requirements.

14 JUSTICE SCALIA: These -- these other plans that  
15 allow you to withdraw for certain reasons but not for any  
16 reason -- what happens if you withdraw for any reason?

17 MS. McKIEVER: That --

18 JUSTICE SCALIA: What is the sanction against --  
19 I mean, you just go in. You withdraw the money for -- for  
20 a reason that is not allowed by the employer plan. What  
21 -- what is the sanction?

22 MS. McKIEVER: My understanding is that -- is  
23 that you cannot access the funds for a reason not allowed  
24 by those plans, that that is prohibited. And that -- that  
25 is similar to Ms. Andersen's IRA in the Bankruptcy

1 Appellate Panel case. She could no longer reach the funds  
2 in the -- she could no longer reach the corpus of the  
3 account. The -- the lump sum of money was there for her  
4 retirement years. Whereas, in the IRA situation, the  
5 money is not protected at any time. There's no  
6 prohibition at all whatsoever on withdrawing the funds  
7 from the account other than the payment of the penalty.

8 But whether an account or plan qualifies under  
9 the statute, it -- it -- you look at the language of the  
10 plan on a plan-by-plan basis. The petitioners' argument  
11 renders the terms of the statute superfluous because,  
12 first of all, it is dissimilar from the enumerated plans,  
13 and secondly, it is not on account of any factors that the  
14 money can be reached. The right to receive the payment is  
15 not based upon any factor other than the -- the account  
16 holder wanting to withdraw the funds.

17 JUSTICE STEVENS: Well, but the right to receive  
18 100 percent is -- is dependent on a factor, isn't it?

19 MS. McKIEVER: Yes, it is.

20 JUSTICE STEVENS: Yes. At least as to the 10  
21 percent that would be penalty, there's no right to get  
22 that money unless you have a certain age.

23 MS. McKIEVER: That's correct. Unless you have  
24 -- or another factor such as for education or for a home  
25 loan, something like that. There are several different

1 reasons that you can -- you can reach the money and not  
2 pay a penalty.

3           However, the penalty is not -- is not the  
4 deciding factor. It's their ability to access the funds  
5 at any time that -- that makes that a right of payment.  
6 It's not a right of payment without a penalty. It's just  
7 that the right to payment exists at all times.

8           JUSTICE GINSBURG: You don't dispute that --  
9 that a small percentage of people who have IRA's, in fact,  
10 exercise the right to withdraw, given the penalty.

11           MS. McKIEVER: That -- that -- that is --  
12 appears to be correct. I don't have those exact  
13 statistics, but yes, that -- that appears to be correct,  
14 that they have -- that they may not exercise that at -- in  
15 great numbers.

16           First of all, going back to the causation factor  
17 about the -- the ability of the debtors to withdraw the  
18 funds for any reason or no reason, this Court in the 203  
19 North LaSalle case determined that on account of must mean  
20 because of, and that -- that is a key point here because  
21 if the debtors can reach the funds for any reason, it is  
22 not because of any other factor. And in the LaSalle case,  
23 this Court found that that reading, the because of  
24 reading, absolutely applies to this section of the -- the  
25 Bankruptcy Code, that means that the result is that a

1 direct causal connection is required between the right to  
2 receive the payment in the on account of requirements. In  
3 -- in this case there is no causal connection whatsoever  
4 between the right to receive the payments and -- and any  
5 of the factors enumerated in the statute.

6 JUSTICE STEVENS: Of course, the words, on  
7 account of, in this -- this statute are sort of unusual,  
8 no matter how you construe them, because really the  
9 payment is on account of the years of service or it's on  
10 account of a lot of things. You may become eligible at a  
11 certain time. It would be better if it said a payment for  
12 which you became eligible for one of these reasons because  
13 the payment isn't really on account of all of these  
14 things. You may get the same amount whether you're  
15 disabled or not depending on what the terms of the plan  
16 are.

17 MS. McKIEVER: That's correct. There are, of  
18 course, always some other factors, such as you have to  
19 first deposit the money, you have to become eligible. But  
20 once those barriers are passed, then -- then the right to  
21 receive the payment has to be at least -- one of the  
22 causes must be one of these factors. And it has to be  
23 enumerated in the plan. It cannot be for any reason, but  
24 must be an enumerated reason in the plan.

25 And the -- with the penalty, only the avoidance



1 of a penalty is based upon the -- the age of the debtor or  
2 the -- or any of the factors. It's -- section  
3 522(d)(10)(e) is void of any reference to the tax status  
4 or to the right to receive the payment without penalty.  
5 It's only the right to receive the payment overall.

6 JUSTICE GINSBURG: Does your argument draw a  
7 ring around IRA's? It was suggested that if your argument  
8 prevails, then these other plans would be affected as  
9 well.

10 MS. McKIEVER: Only to the extent that -- that  
11 they are not payable for any of the reasons enumerated in  
12 the statute. If -- if they are available for payment at  
13 any time for any reason, then -- then they would not  
14 qualify. But the specified accounts, so long as they're  
15 payable for -- for one of the factors and that there's a  
16 direct nexus between the right to receive the payment and  
17 -- and the factors, then -- then they would qualify for  
18 the exemption. It is not, by any stretch, all IRA's. It  
19 is just the types that -- currently that the petitioners  
20 would have or that people would have that would allow the  
21 access at any time for any purpose. So it's not that the  
22 trustee is looking to have IRA's not be eligible for  
23 exemption. It's just the types of accounts from which all  
24 the funds can be withdrawn at any time for any purpose.

25 There are many qualifying IRA's that do exist,

1     that can exist. It's just that people have set these up  
2     from standard plans allowing them access. Whether they  
3     access the funds or not is not the key, but the ability to  
4     access the money because it doesn't meet the statutory  
5     requirements. There are several IRA's, though, that can  
6     and do meet the statutory requirements. It's just that  
7     the petitioners' don't.

8             The case law in the Eighth Circuit was well  
9     settled, prior to the filing of this bankruptcy, that for  
10    approximately 12 years, that the definition of similar  
11    plan or contract did not include IRA's such as this, and  
12    that the on account of factors had to be satisfied to  
13    claim this exemption. The -- the debtors knew or -- or  
14    potentially should have known that -- that their IRA's  
15    were likely not exempt out of Eighth Circuit at the time  
16    that they filed because of the way that -- that these had  
17    been construed for a long period of time. So that they  
18    could have set up accounts that did qualify for such  
19    exemption, but -- but they did not restrict their access  
20    in that way.

21            Thank you.

22            JUSTICE STEVENS: Thank you, Ms. McKiever.

23            Ms. Karlan, you have about 7 minutes. You're  
24    not required to use it all.

25            REBUTTAL ARGUMENT OF PAMELA S. KARLAN

1                   ON BEHALF OF THE PETITIONERS

2           MS. KARLAN: I'm going to retire early.

3           (Laughter.)

4           MS. KARLAN: The -- the first point is that  
5 there are two rights under IRA's: the right after age 59  
6 and a half or upon death or disability or illness to  
7 withdraw the money without any kind of penalty; and  
8 there's a second little exercise, an entirely subsidiary  
9 right, which is the ability to withdraw money subject to a  
10 penalty earlier. The existence of that second entirely  
11 subsidiary, almost never used right -- and the statistic  
12 on this is in the green brief at page 23 -- means that the  
13 real essence of an IRA is it is a plan on account of age.

14           The second point. As this Court said last  
15 year --

16           JUSTICE SCALIA: You don't really have a right  
17 to receive it on account of age. You have a right to  
18 receive it without a penalty on account of age.

19           MS. KARLAN: Well, at the age of --

20           JUSTICE SCALIA: It isn't the right to receive  
21 the money that depends on your age. It's the right to  
22 receive the money without paying a tax.

23           MS. KARLAN: Well, that's a right that's very  
24 important because let me give you just a mathematical  
25 example of the difference.

1 JUSTICE SCALIA: It is a right that's important,  
2 but it's not what the statute says. The statute says --

3 MS. KARLAN: The statute gives that right.

4 JUSTICE SCALIA: -- the right to receive a  
5 payment on account of, among other things, age.

6 MS. KARLAN: And you do have that right. You  
7 also have another right. But the existence of that second  
8 right doesn't negate the first right. The statute doesn't  
9 here, for example, as section 522 or section 365 of the  
10 Bankruptcy Code does, use the word solely to say you -- a  
11 plan is eligible only if you have solely the right to  
12 receive on this --

13 JUSTICE SCALIA: No, but it lists the other  
14 reasons: on account of illness, disability, death, age,  
15 or length of service. And -- and, you know, when you have  
16 a list like that, you would think that the right to  
17 receive the money for some other reason doesn't -- doesn't  
18 qualify. I mean, I would think that that's --

19 MS. KARLAN: That might be your first thought,  
20 but then --

21 JUSTICE SCALIA: Or -- or at least -- at least  
22 some other reason that isn't closely related to those.

23 MS. KARLAN: Oh, but I think even if that were  
24 your first thought, you would then get to the implication  
25 that many of the Justices have been pressing today, which

1 is the implication of that for all plans is tremendous  
2 because all plans give -- well, I shouldn't say all plans,  
3 but I should say the vast majority of other plans, 401(k)  
4 plans, profit-sharing plans, and the like, do give you  
5 early access to your money, and that's valuable to you.

6 That's why in section --

7 JUSTICE O'CONNOR: Is it true that none of them  
8 give unfettered access? They're all qualified in some  
9 fashion. Do you agree with that?

10 MS. KARLAN: Well, the qualification of hardship  
11 has been interpreted by many employers to say, you want to  
12 buy a house and you can't otherwise? That's a hardship.  
13 You want to sent your kid to school and you can't  
14 otherwise? That's a hardship. You have huge, you know,  
15 consumer loans and you could consolidate that? That's a  
16 hardship. So it's not as if IRA's operate differently  
17 from everything else in the system. That's why --

18 JUSTICE SCALIA: Well, yes. You -- you don't  
19 have to make up a hardship. You just say I want the  
20 money. Okay, you want the money? Here's the money.

21 MS. KARLAN: I think that's --

22 JUSTICE SCALIA: I don't even have to lie about  
23 the hardship. I mean --

24 (Laughter.)

25 MS. KARLAN: I need the money. I don't have the

1 money. That's a hardship. If you -- if all you have to  
2 say is the magic word hardship, I think that's why we  
3 would say IRA's are similar plans or contracts because  
4 this Court has made it clear similar is not the same thing  
5 as identical. So if similar reasons allow you to  
6 withdraw, that's enough.

7 And that's why in section --

8 JUSTICE SCALIA: In any of these other plans,  
9 can you get the money so long as you're willing to pay a  
10 penalty?

11 MS. KARLAN: As I read the New York City --

12 JUSTICE SCALIA: Without any qualification for  
13 disability, illness. No. I just want the money. Give me  
14 the money and I'll pay you 10 percent. Is there any plan  
15 that works like that?

16 MS. KARLAN: I don't know, but the New York City  
17 Police Department plan appears to work like that. You can  
18 take the money out if you pay the 10 percent penalty.

19 JUSTICE STEVENS: Has any judge ever taken the  
20 view that -- adopting Justice Scalia's approach, that  
21 while you can't put the whole IRA -- exempt the whole IRA,  
22 but you can exempt 10 percent of it?

23 MS. KARLAN: Not to my knowledge.

24 JUSTICE STEVENS: At least you ought to get that  
25 much, it seems to me, under his -- his analysis.

1 MS. KARLAN: We'd be happier with 10 percent  
2 than nothing, but no judge has ever read the statute that  
3 way.

4 The second point is a point that comes out of  
5 this Court's decision last year in the Till case where the  
6 Court said, look, you want to pick a manageable line, a  
7 line that's straightforward and familiar. And here's one  
8 that I'll give you that comes directly from the text of  
9 section 522(d)(10)(e), which is you should hold that  
10 section 522(d)(10)(e) permits the exemption of all plans  
11 or contracts that qualify under section 401(a), section  
12 403(a), section 403(b), or section 408 of the Internal  
13 Revenue Code, which IRA's do.

14 And this may have led to some of the confusion,  
15 I think, between counsel in this case, which is in the  
16 Andersen case, although Ms. Andersen was receiving money  
17 under section 408, it was not a 408 individual retirement  
18 account. It was, instead, under section 403(b), an  
19 individual retirement annuity. So there are, as far as we  
20 know, no individual retirement accounts, the things you  
21 put money into while the money accumulates before you're  
22 ready to retire and you transfer it into an annuity that  
23 are customizable.

24 And indeed, for the kinds of debtors who need  
25 the protections of section 522(d)(10)(e) the most, the

1 unsophisticated people who are putting their money away in  
2 an IRA because their pension plan either doesn't exist at  
3 all or isn't adequate for their retirement, the idea that  
4 they would understand to go in and negotiate at a bank for  
5 a customizable IRA strikes me as quite implausible.

6 That's why we think the most sensible reading of  
7 the statute here is to exempt IRA's when the money in them  
8 is necessary for the support of the debtor.

9 Thank you.

10 JUSTICE STEVENS: Thank you.

11 The case is submitted.

12 (Whereupon, at 11:02 a.m., the case in the  
13 above-entitled matter was submitted.)

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